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Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	
Implementation of Section 255 of the Telecommunications Act of 1996	
Access to Telecommunications Services, Telecommunications Equipment, and Customer Premises Equipment By Persons with Disabilities	WT Docket No. 96-198

REPLY COMMENTS OF
THE INFORMATION TECHNOLOGY INDUSTRY COUNCIL

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SUMMARY

In recent years, the diverse, highly competitive, and technologically dynamic information technology ("IT") marketplace has produced exponential leaps in assistive technologies, opening a new and ever-expanding world of possibilities to consumers with disabilities. The Commission's rules should take advantage of the diversity and competition in the IT market and resist the invitation of some commenters to subvert the objectives of Section 255 by undermining the very marketplace forces that have most benefited people with disabilities.

The Commission should not, as proposed by some, adopt the Access Board's guidelines wholesale and transform them into binding regulations. Although useful and relevant, the guidelines require critical examination of their underlying assumptions and the standards they would produce. The Commission should not attempt to extend the scope of Section 255 to information services since this would be inconsistent with the plain language of Section 255 and with Commission precedent, and would ultimately frustrate manufacturers' ongoing efforts to enhance accessibility. Comments filed in this proceeding also confirm that only a "direct control" approach, as proposed in the NPRM, will provide a clear and enforceable standard for evaluating the application of Section 255 to manufacturers of multi-use equipment.

ITI supports those commenters who emphasize a product line approach to accessibility. In addition, the Commission's rules should clarify that, consistent

with the IT market's "plug and play" dynamic, the market-wide availability of accessibility solutions is relevant to determining the Section 255 obligations of particular IT manufacturers. The Commission should not establish a mandatory list of "commonly used" equipment since this would be ineffective and prejudicial to those "niche" manufacturers who currently are at the forefront of accessibility innovations.

Several commenters argue that the Commission should defer to ADA concepts and precedent when evaluating whether accessibility is readily achievable. But the ADA approach is of limited utility in the context of telecommunications and customer premises equipment whose accessibility must be evaluated in light of significantly different issues, such as cost recovery, product marketability, opportunity costs, the structural constraints on the availability of corporate resources to equipment manufacturers, the interplay between modifications to the design process and product cycles, and potential delays in the release of new products.

Finally, in enforcing Section 255, the Commission should adopt TIA's proposed dispute resolution procedures, which are likely to be more efficient and responsive to consumer needs that the Commission's "fast track" process; refuse to rely upon outside sources for complaint resolution without first developing a body of Section 255 precedent; and reject attempts to unlawfully expand the applicability of common carrier remedies to non-common carriers.

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THE INFORMATION TECHNOLOGY INDUSTRY COUNCIL

The Information Technology Industry Council ("ITI") files these reply comments in accordance with the Federal Communications Commission's ("Commission") Notice of Proposed *Rulemaking*[1] ("NPRM") in the docket captioned above.

INTRODUCTION

As described in its initial comments,[2] ITI's members manufacture a broad array of information technologies and equipment which enable all consumers, and in particular those with disabilities, to benefit from advances in technology. In its comments, ITI emphasized both the competitive nature of the unregulated

[1] *Implementation of Section 255 of the Telecommunications Act of 1996, Access to Telecommunications Services, Telecommunications Equipment,* **and** *Customer Premises Equipment By Persons with Disabilities,* WT Docket No. 96-198, Notice of Proposed Rulemaking (rel. April 20, 1998) ("Notice" or "NPRM").

[2] See Comments of the Information Technology Industry Council in WT Dkt. No. 96-198 (filed June 30, 1998). ("ITI Comments").

information technology ("IT") market, which has stimulated these impressive technological advances and innovations, as well as the advantages of the IT market's "plug and play" environment, which empowers consumers to customize their IT system and equipment configuration to meet the needs of the individual. ITI expressed concern, however, that some of the Commission's proposals, without modification, would thwart manufacturers' efforts to develop innovative technological advances and solutions, would discourage specialization, and would impose needless costs on all consumers, disabled and non-disabled alike.

Many of the comments filed in this proceeding paint a bleak picture of current trends in the availability of accessible technology. Commenters argue that without regulation "accessibility progress may . . . be lost" in the wake of technology convergence.[3] They urge the Commission to broadly construe Section 255 to include information services and software, notwithstanding the fact that (i) Congress explicitly limited Section 255 to telecommunications equipment ("TE"), customer premises equipment ("CPE") and telecommunications services; and (ii) the Commission has already concluded in its Report *to Congress*[4] that the statute defines "information services" and

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[3] See Comments of the National Council on Disability in WT Dkt. 96-198 (filed June 30, 1998) at 4 ("NCD Comments"). With respect to telecommunications equipment, in particular, see Comments of the National Association of the Deaf in WT Dkt. 96-198 (filed June 30, 1998) at 14 ("NAD Comments") ("[w]ithout Section 255 coverage, there will be no [transmission] path [for people with disabilities] at all"); Comments of the American Council of the Blind in WT Dkt. 96-198 (filed June 30, 1998) at 2 ("AFB Comments") ("[c]lear, uniformly applied regulations are the only means by which the telecommunications industry will make its services and products accessible to blind people").

[4] Federal-State *Joint* Board *on* Universal Service, CC Docket No. 96-45, Report to Congress, FCC 98-67 (rel. April 10, 1998) ("Report to Congress").

"telecommunications" as separate and distinct services that are not subject to the same Title II regulations.[5]

More importantly, these commenters give little more than a shrug to the exponential leaps in the development of assistive technologies that have occurred over the last two decades, thanks in many cases, to advances in underlying information technology. For example, shortly after the debut of the first IBM personal computer ("PC") in 1981, the IT marketplace produced both the screen reader, targeted to those with vision impairments, and the first voice recognition system, which helps those with mobility impairments. At the time, the screen reader cost several thousand dollars and was difficult to manipulate. The voice recognition device cost approximately $20,000 and had a vocabulary of approximately 2,000 words. Less than two decades later, the screen reader has dropped in price to only a few hundred dollars, is produced by multiple manufacturers, and supports a variety of capabilities. Similarly, the voice recognition product is now widely available at a cost of approximately $100, and has a general vocabulary of approximately 20,000 words, which may be supplemented by industry-specific vocabularies.

As described in ITI's initial comments, these remarkable inventions have been joined by hundreds of other assistive devices produced by multiple manufacturers that allow people with disabilities to do everything from performing mundane household tasks, such as turning on and off a light switch or opening

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[5] *Id.* at ¶ 39, 47.

and closing a door, to operating complex computer programs through the use of switches that may be manipulated by the foot, the eye, the eyebrow, or even the tongue. Specialized manufacturers are working every day toward new accessibility solutions designed to open the world of basic and advanced technologies to those with disabilities. Some of these very technologies were demonstrated at the Commission's open meeting last April.' All of these innovations, however, are being developed by information technology and telecommunications manufacturers without any government oversight or regulatory requirement to do so.'

Some commenters contend, and would apparently have the Commission believe, that absent government regulation, manufacturers will make little or no effort to ensure that new technologies are accessible to individuals with disabilities. As discussed above, history proves that in fact the opposite is true. Many information technology manufacturers have expended enormous time and resources making new technologies accessible. ITI members find it virtually inconceivable that a manufacturer in today's world would not consider and

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6 Telecommunications Reports International, Inc. *Draft FCC Rule Would Mandate Carrier, Manufacturer Outreach to Disabled Customers,* TR Daily, (Telecommunications Reports International, Washington, DC), April 2, 1998, at 2.

7 The Comments of the Telecommunications Industry Association ("TIA") and Motorola further demonstrate the broad impact voluntary industry efforts have had on accessibility through development of technologies such as the vibrating pager, visual displays on CPE, the "talking pager," and a Hearing Aid Compatible analog cellular telephone. See Comments of the Telecommunications Industry Association in WT Dkt. 96-198 (filed June 30, 1998) at 2-5. ("TIA Comments"). Comments of Motorola, Inc. in WT Dkt. 96-l 98 (filed June 30, 1998) at 4, 11 ("Motorola Comments). See *a/so* Comments of Lucent Technologies in WT Dkt. 96-198 (filed June 30,1998) at 3.

incorporate accessibility features into new technologies wherever readily achievable.

While ITI recognizes that there is still much potential for additional progress toward enhancing accessibility, and ITI's members have demonstrated their commitment to such a goal, that progress will not be accelerated by the adoption of rigidly applied guidelines or policies that presume benign neglect by manufactures of the needs of people with disabilities. The Joint Conference Report to the Telecommunications Act of 1996 specifically provides that the Act is intended to "provide for a pro-competitive, deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition . . ."[8] The IT market is doing just that.

Manufacturers, including ITI's members, are constantly spurred by competition to develop faster, smarter, and cheaper advanced technologies. The unique, competitive dynamic of the IT market has opened a world of possibilities to the consumer, and stimulated unprecedented levels of technological growth over the past few years. These technological breakthroughs have allowed information technology products to become more generally available over time, particularly as costs decrease, products become smaller and easier to use,; and accessibility issues are resolved. Although

[8] H.R. CONF. REP. No. 104-458, at 1 (1996) ("Joint Conference Report").

developing accessible versions of new or improved technologies takes time, IT and telecommunications manufacturers have consistently done what is necessary to refine and develop their technological breakthroughs, as described in the comments of ITI, Lucent, Motorola, the Telecommunications Industry Association ("TIA"), and others.[9]

In short, the commenters have presented the Commission with a choice. The Commission can adopt rules that harness the IT market's natural forces for innovation and development or it can impose rigid regulations that will slow the pace and innovative pressures of all information technologies without any appreciable benefit to those Section 255 is intended to serve. For the reasons stated in its comments and as set forth below, ITI urges the Commission to reject the latter approach and to adopt instead flexible rules that will take advantage of, not frustrate, the IT marketplace dynamic that has already opened so many doors to those with disabilities. Consistent with this objective, the Commission's rules should adhere to Congress's express language and intent; impose on manufacturers responsibility for only those aspects of accessibility which they can control; and support an enforcement process that focuses on expediting constructive problem resolution, not creating adversarial relationships where none need exist.

[9] See supra note 7.

I. APPLICABILITY OF THE ACCESS BOARD'S GUIDELINES

The National Council on Disability ("NCD"), Self-Help for Hard of Hearing People ("SHHH") and the National Association of the Deaf ("NAD"), among others, urge the Commission to adopt the Architectural and Transportation Barriers Compliance Board's ("Access Board's") guidelines (the "Guidelines")" without change." These commenters, as well as the Access Board itself, argue that the statute assigns to the Access Board responsibility for developing, reviewing and updating the Guidelines, and that the Guidelines provide "clear guidance to the public."[12] They further argue that the Commission has adequate authority to depart from the Guidelines where necessary, and may address specific concerns in the context of future revisions to the Guidelines.[13]

In its comments, ITI proposed that the Guidelines pertaining to equipment functions should be considered relevant but not determinative of whether covered equipment is accessible under Section 255. The same holds true for the Guidelines as a whole. Like TIA, Siemens Business Communications ("Siemens"), and others, ITI urges the Commission not to elevate the role of the Guidelines beyond that established by Congress. Although the Guidelines may be useful to the Commission in evaluating Section 255 compliance, nothing in the express language of Section 255 requires the Commission to adopt them

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[10] 36 C.F.R. $1193.1, et *seq.*

[11] Comments of Self-Help for Hard of Hearing People in WT Dkt. 96-198 (filed June 30, 1998) at 4-5 ("SHHH Comments"); NCD Comments at 2-3; NAD Comments at 4.

[12] SHHH Comments at 4-5; Comments of the Architectural and Transportation Barriers Compliance Board in WT Dkt. 96-198 (filed June 30, 1998) at 2 ("Access Board Comments").

wholesale. Moreover, the Commission should not apply the Guidelines to a particular dispute without a critical examination of the standards they would establish and the assumptions underlying them.[14] The Commission has unique and in-depth expertise regarding the services and equipment addressed by Section 255. The Commission should not give "substantial weight" to the Guidelines but should instead consider them as part of a complete analysis that takes into account the competitive forces and technological developments that drive technology markets.

ITI also is concerned that Section 255(e), which requires the Access Board to "review and update the guidelines periodically," should not become a vehicle for the Access Board to unilaterally change the Guidelines or their applicability to disputes.[15] As evidenced by the broad range of parties who commented in the Access Board's proceeding, Section 255 and the Guidelines will have a significant impact on manufacturers and consumers alike. Due process requires that the Access Board and Commission should give public notice of any future revisions to the Guidelines to allow the full participation of all affected parties, including industry experts.

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13 Id.

14 TIA Comments at 7; Comments of Siemens Business Communications in WT Dkt. 96-198 (filed June 30, 1998) at 3-4 ("Siemens Comments").

15 47 U.S.C. § 255(e).

II. SCOPE OF SECTION 255

A. The FCC Has No Authority to Expand the Scope of Section 255 to Include Information Services

ITI and others support the FCC's tentative conclusion that equipment used solely in connection with information or enhanced services falls outside the scope of Section 255.[16] Other commenters argue that, notwithstanding the plain language of the statute, limiting the scope of Section 255 to telecommunications equipment and telecommunications services flies in the face of Congressional intent to make new telecommunications advances accessible to individuals with disabilities." Their position is unsupported by either law or fact. The Commission's extension of Section 255 to include information services would violate the Communications Act of 1934, as amended," and would be inconsistent with Commission precedent and policy. Most importantly, Congress's objective in adopting Section 255 can be better met by an unregulated IT marketplace.

First, the plain language of Section 255 excludes information services and equipment used exclusively in the provision of such services. Section 255 establishes accessibility requirements only for telecommunications equipment and customer premises equipment:

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16 ITI Comments at 8-10; Comments of the Business Software Alliance in WT Dkt. 96-198 (filed July 1, 1998) at 6-8 ("BSA Comments"); TIA Comments at 53-56; Comments of SBC Communications Inc. in WT Dkt. 96-198 (filed June 30, 1998) at 2-4 ("SBC Comments").

17 ("NAD") Comments at 9; Comments of the World Institute on Disability in WT Dkt. 96-198 (filed June 30, 1998) at 4-5 ("WID Comments"); SHHH Comments at 5; NCD Comments at 6-8.

18 Telecommunications Act of 1996, Pub. L. No. 104-104 Stat. 56 (codified at 47 U.S.C. §§ 151, et. seq.) ("1996 Act").

> . . . (b) MANUFACTURING. --- A manufacturer of *telecommunications equipment* or *customer premises equipment* shall ensure that the equipment is designed, developed, and fabricated to be accessible to and usable by individuals with disabilities, if readily achievable.
>
> (c) TELECOMMUNICATIONS SERVICES. ---A provider of *telecommunications service* shall ensure that the service is accessible to and usable by individuals with disabilities, if readily achievable.
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> . . .
>
> (e) GUIDELINES. --- Within 18 months . . . the Architectural and Transportation Barriers Compliance Board shall develop guidelines for accessibility of *telecommunications equipment* and *customer premises equipment* in conjunction with the Commission.
>
> . . .[19]

The definitions of "telecommunications equipment", "customer premises equipment" and "telecommunications services" are set forth in Section 3 of the Act.[20]

As detailed in ITI's initial comments, the Section 3 definitions make clear that TE, CPE and telecommunications services do not include information services or equipment used in conjunction with such services.[21] Moreover, Section 255 refers to TE, CPE and telecommunications services only, and does not suggest that the definitions of TE, CPE or telecommunications services should be anything other than those articulated in Section 3.[22] Nor is there any language in the legislative history of the 1996 Act to suggest that Congress intended Section 255 to cover information services. Thus, the Commission has

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19 47 U.S.C. §255 (b), (c), (e) (emphasis added).

20 47 U.S.C. § 153.

21 ITI Comments at 8-10; 47 U.S.C. § 153 (14), (45), (46).

22 Section 3 provides that "[f]or purposes of this Act," such terms shall be as defined in Section 3 "unless the context otherwise requires---" 47 U.S.C. § 153.

no statutory authority to expand the scope of Section 255 to include information services or equipment used for the provision of such services.

Second, the Commission clearly affirmed in its *Report* to *Congress*, that "information services" do not constitute "telecommunications" as that term is defined by the 1996 Act.[23] In the Report, the Commission reiterated its long-standing concern that the application of Title II regulation (of which Section 255 is a part) to information services and technologies would chill innovation and slow competitive growth in the information services market. These same policy considerations arise in the context of Section 255, and mandate the same conclusions.

Finally, as described above, the Commission will not achieve the objectives of Section 255 by imposing rigid regulations on manufacturers of equipment used for information services. The IT marketplace already works. Under the "plug and play" approach in this market, IT manufacturers produce equipment that individuals can use to customize solutions that address their needs. Manufacturers do not avoid accessibility issues; they solve them. As a result of vigorous competition and innovation, the IT marketplace is continually flooded with new technologies and advances in services and equipment that produce better solutions to the issues faced by individuals with disabilities. The Commission does not need to expand its regulatory reach beyond that

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23 Report to Congress at ¶ 39, 47. See *also* ITI Comments at 9-10.

established by the statute in order to produce the type of technology environment that Congress seeks to foster in Section 2.55.

B. The "Bright Line" Test For Multi-Use Equipment Should Be Based on Manufacturer Control

The record reveals a sharp split between manufacturers and disabilities groups regarding the extent to which Section 255 applies to multi-use equipment. Groups representing those with disabilities, for the most part, argue that coverage of multi-use equipment should depend on whether the equipment is in fact used for a telecommunications function,[24] whereas some manufacturers argue that the intent of the manufacturer should govern coverage of multi-use equipment.[25] The American Foundation for the Blind ("AFB") argues that *all* functions in a piece of multi-use equipment should be Section 255 compliant whether or not they are used to provide a telecommunications function, reasoning that any other approach will skew manufacturer incentives.[26]

ITI is concerned that focusing exclusively on *either* intent or function will lead to results incompatible with the objectives of the statute and the realities of commerce. Under either test, manufacturers would be responsible for the choices made by consumers of their products after a sale is consummated. A standard that imposes statutory obligations on manufacturers because their equipment could be used for telecommunications functions is over-broad and

[24] See SHHH Comments at 8; NAD Comments at 18.

[25] TIA Comments at 57-62; Comments of the Consumer Electronics Manufacturers Association in WT Dkt. 96-198 (filed June 30, 1998) at 8-l 0 ("CEMA Comments").

would improperly subject manufacturers to regulation of equipment used exclusively to provide information services. On the other hand, a standard based on intent raises insurmountable evidentiary issues (how would a manufacturer's intent be assessed?) and may define the scope of multi-use equipment too narrowly. Throughout the NPRM, the Commission properly focused on "direct control" as a measure for allocating responsibilities under Section 255.[27] ITI endorses this approach and submits that only this approach will fairly and consistently sort through the grey areas created by converging technologies.

In its initial comments, ITI urged the Commission to establish an enforceable "bright line" for distinguishing between those aspects of equipment that are subject to Section 255, and those that are not. After consideration of the record, and consistent with the FCC's articulated principles, ITI urges the Commission to adopt a "bright line" test for multi-use equipment that uses "direct control" as the means for determining Section 255 compliance obligations. Specifically, ITI urges the Commission to find that only those functions that can be used exclusively for telecommunications should fall on the "telecommunications" side of the bright line since these are the only functions clearly designed by the manufacturer solely for telecommunications use by

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26 Comments of the American Foundation for the Blind in WT Dkt. 96-198 (filed July 1, 1998) at 19 ("AFB Comments").

27 *Implementation of Section 255 of the Telecommunications Act of 7996, Access to Telecommunications Services,* Telecommunications Equipment, and Customer Premises *Equipment By Persons with* Disabilities, WT Dkt. 96-198, Notice of Proposed Rulemaking (rel. Apr. 20, 1998) at 77-80 ("Notice" or "NPRM").

consumers, and therefore such use is effectively under the manufacturer's direct control.

Under this "bright line" test, multi-use equipment would fall outside of Section 255 if it performs a telecommunications function solely when a consumer chooses to use it in combination with other equipment or software of the consumer's choice that enables telecommunications functions. Multi-use equipment that provides telecommunications on a stand-alone basis and is marketed by the manufacturer as serving such a function (through advertisements or user manual instructions) would be subject to the Act. In this latter instance, the manufacturer exerts direct control over the consumer's use of the equipment as "telecommunications equipment" and should therefore be accountable for any accessibility requirements associated with the telecommunications functions of such equipment.

C. Definition Of "Manufacturer"

Several commenters propose imposing Section 255 compliance obligations on any entity in the "manufacturing chain," including wholesalers and retailers.[28] In particular, the Trace Research & Development Center ("Trace Center") proposes defining a "manufacturer" as "[a]ny company developing a product, component, or sub-component that is designed specifically for, or marketed as, a product (or component) for use in telecommunication."[29] The

[28] Comments of the Trace Research & Development Center in WT Dkt. 96-198 (filed July 1, 1998) at 16 ("Trace Center Comments"); NCD Comments at 16-17; AFB Comments at 22-24.

[29] Trace Center Comments at 14.

Commission should reject this approach, however, since it improperly imposes liability on entities that have no control over the ultimate design and function of a telecommunications product.

In the NPRM, the Commission adopted the Access Board's "final assembler" approach. The Commission concluded that imposing responsibility on the final assembler would keep oversight of Section 255 compliance within manageable parameters and would give the manufacturer with the most control over equipment assembly incentive to obtain accessible components from its suppliers.[30] The Commission's proposal and the underlying reasoning is entirely logical and practicable.[31] It allocates responsibility fairly and equitably, and with the modifications proposed by ITI, should be adopted.

III. STATUTORY REQUIREMENTS

A. Accessibility Should Be Assessed Based on a Marketwide Basis

ITI endorses the comments of TIA and Motorola which, like its own, conclude that a "one size fits all" approach would be detrimental to the innovation and customization that currently characterizes IT markets. Instead, the availability of accessibility features across a product line should be sufficient to meet Section 255's requirements for TE and CPE.[32] With respect to the IT equipment marketplace, the Commission should also (as proposed in ITI's comments) assess accessibility based on a market-wide view and find that

30 NPRM at ¶ 60.

31 *Id.*

32 TIA Comments at 1 O-I 9; Motorola Comments at 6-20

Section 255 compliance requirements are met where the marketplace as a whole is producing an accessibility solution.

The "plug and play" approach is premised on the simultaneous development and production of a multiplicity of technology solutions, manufactured by various specialists that meet disparate consumer needs. It is this flexible approach, conducive to diversity and experimentation, that has fueled the burst of advanced technologies that currently predominate in the IT marketplace. Requiring each manufacturer to offer products already being produced by others is fundamentally inconsistent with the operation of the IT market and would result in an inefficient use of resources. Like other successful, competitive markets, the IT market has expanded because its manufacturers invest in research and development for new and better product designs, rather than merely replicating the accessibility solutions that are already available in the marketplace. Such an approach produces clear benefits to consumers, including those with disabilities. The Commission should recognize these pro-consumer aspects of the market and define accessibility (at least as it relates to IT manufacturers) based on marketwide availability of an accessibility solution [33]

[33] With respect to the "usability" aspect of accessibility, ITI agrees that the statutory requirement that TE and CPE should be "usable" by individuals with disabilities presumes a certain level of service support, and therefore endorses SBC Communications' position that "functional use generally will require accessible "support services," such as product information and instructions." SBC Comments at 6. The Commission should, however, adopt rules which give manufacturers flexibility to determine how best to serve their customers, and should not impose specific requirements concerning a manufacturers "business practices," training procedures, customer support and similar internal operations as proposed by several commenters. SHHH Comments at 10-11; NAD Comments at 5-6; NCD Comments at 34. "Usability" does not contemplate such invasive regulation.

B. List Of 'Commonly Used" Equipment

In its comments, ITI questioned the need and advantages of establishing a mandatory list of "commonly used" equipment, Comments filed in this proceeding only heighten ITI's concern that the alleged benefits of the list will be diminished by the list's effectiveness. In addition, unlisted equipment would, as noted by the National Council on Disability, likely be at a significant competitive disadvantage to the extent the list emerges as the de facto standard for compliant equipment.[34]

In the event, however, that the Commission decides to implement such a list, the Commission should clearly identify the criteria necessary for meeting list requirements[35] and should not rely upon statewide equipment distribution program lists since the lists will be inconsistent and frequently modified.[36] Moreover, in order to retain a measure of impartiality, the Commission, and not the Association for Access Engineer Specialists or other non-governmental organization, should maintain the list.[37]

C. The "Readily Achievable" Standard

Several commenters urge the Commission to eliminate consideration of cost recovery and opportunity costs from the "readily achievable" analysis, arguing that such factors are impermissible under and inconsistent with the

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34 NCD Comments at 18.

35 The Commission's criteria should include whether equipment is compatible with equipment already on the list.

36 Trace Center Comments at 6-7.

37 See NAD Comments at 9.

American for Disabilities Act ("ADA").[38] They further contend that the Commission should disregard corporate structure and consider the resources available not only to the individual manufacturing unit that assembles the final product, but throughout the entire manufacturing chain.[39] Their arguments are untenable.

1. Applicability of the ADA

The drafters of the ADA did not contemplate the telecommunications equipment or telecommunications services environment. While the ADA may have served as a guide for Congress in its decision to invoke a readily achievable standard in Section 255, the utility of concepts developed in the context of the ADA is limited in the context of TE and CPE. The fallacy of attempting to apply the ADA to telecommunications is particularly clear in the controversy over whether to include cost recovery in the readily achievable analysis.

In arguing against consideration of cost recovery, the National Association for the Deaf analogizes to a football stadium and contends that the Commission's proposed rules would allow the owners of a football stadium in a small town with few individuals in wheelchairs to argue that they need not

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38 *Americans with Disabilities* Act *of* 7990, 42 U.S.C. § 12101, et *seq. See* WID Comments at 3, 5; Comments of the Presidents Committee on Employment of People with Disabilities in WT Dkt. 96-198 (filed June 30, 1998) at 9, 13 ("PCEPD Comments"); Comments of the American Council for the Blind in WT Dkt., 96-198 (filed June 30, 1998) at ¶ 9 ("ACB Comments"); SHHH Comments at 16-18; NCD Comments at 21-26; Access Board Comments at 4; NAD Comments at 23, 26-29; AFB Comments at 28, 31-44.

39 AFB Comments at 39-40;

provide accessible seating because the owners could not recover the costs.[40] The National Council on Disability, meanwhile, uses the example of the restaurant that would be able to avoid ADA requirements when it has unappetizing food that attracts so few customers that it will not be able to recover its costs.[41] However, ITI does not propose, as the NAD and NCD suggest, that a failure to recover costs should automatically relieve manufacturers from Section 255 compliance obligations, Rather, a manufacturer's inability to recover its costs should be a factor the Commission considers in determining whether making a product accessible under Section 255 is "readily achievable."

The NAD's and NCD's examples, moreover, are not representative of the obstacles faced by manufacturers of TE, CPE or IT equipment. The cost recovery that ITI and other commenters are concerned about is not simply the one-time cost of an accessibility accommodation for long-term physical facilities that require relatively simple design solutions, as would be the case with the stadium or restaurant examples. Rather, the rules contemplated under Section 255 would impose a fixed cost associated with the one-time modification of manufacturing facilities to accommodate a design change as well as the recurring costs associated with introducing that change into each piece of equipment that is produced (which will likely have a short shelf life), and then the

[40] NAD Comments at 28-29.

[41] NCD Comments at 21. With respect to this particular example, ITI submits that accessibility is the least of the restaurant's problems.

cumulative costs associated with integrating the change into each upgrade and modification.

Finally, cost recovery places a cost in the proper economic context, requiring that the Commission consider not only the cost of accessibility but its impact on a manufacturer. There is a significant difference, for example, between a potential cost recovery deficit that reduces product profits from 50% to 40% and one that converts a 10% profit into a 5% loss. There also is a difference between the manufacturer whose failure to recover costs will not affect its decision to continue producing a piece of equipment and the manufacturer that produces equipment in a competitive market that has pushed profits down to such tight margins that additional costs would force the manufacturer to either cease production altogether or increase prices beyond the reach of those who would otherwise benefit from the product.[44]

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[44] Commenters arguments regarding opportunity costs and marketing raise the same issues. The AFB and others contend that consideration of opportunity costs is impracticable since they cannot be "sensibly quantified." AFB Comments at 35. Consideration of opportunity costs will not require the Commission to perform a precise quantification, however, in order to recognize that a manufacturer's expenditure of resources in one area necessarily means that the manufacturer cannot dedicate resources elsewhere. Manufacturers must be permitted to introduce evidence that resources allocated to accessibility features for a particular product would divert resources from, and delay or de-rail completely, other technological developments. Manufacturers also need to have the discretion to make every day decisions based on the market and how best to meet their customers' varying needs (e.g., modifying manufacturing processes and every widget to incorporate an accessibility feature that will be used by only 5% of consumers versus modifying 5% of its widgets and devoting its remaining resources to dramatically improving accessibility for people who need a different feature). Only this flexibility will ensure that manufacturers can meet the needs of all consumers, including disabled consumers. Similarly, NAD's argument that the Commission should not consider marketability because there will be no competitive disadvantage among companies since all will be affected similarly is, as discussed above, patently untrue. See NAD Comments at 26. A requirement to incorporate a particular accessibility feature may have little effect on one company's product, but drive another out of the market by making its product more expensive or less functional for particular purposes. In short,

2. Availability of Corporate Resources

AFB proposes that the Commission modify its position on the availability of corporate resources and consider additional factors that AFB maintains would provide evidence of Section 255 evasion, (e.g., availability of parent corporate resources to other subsidiaries as evidence that the manufacturing unit in question has been denied resources solely to avoid Section 255 compliance obligations). AFB's concerns are misplaced.

As discussed above, IT manufacturers already incorporate accessibility considerations into their manufacturing processes. While there are many factors that influence a company's decisions regarding its corporate structure, such as tax implications and corporate liability concerns, Section 255 is not one of them. The IT industry supports Congress's objectives and, far from evading the needs of individuals with disabilities, has produced many of the technological advances of great benefit to people with disabilities. The Commission should not be concerned about imaginary structural preferences that could emerge to avoid Section 255. The Commission should instead consider the structural and budgetary constraints that already exist for reasons unrelated to Section 255, and the resulting harm to the IT marketplace if the Commission establishes presumptions regarding the availability of corporate resources that are inconsistent with the current state of the industry.

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these factors are properly included in a manufacturer's internal "readily achievable" assessment, and should be included by the Commission in its own evaluation.